Department of Justice

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JUSTICE DEPARTMENT WILL CHALLENGE FOREIGN RESTRAINTS ON U.S. EXPORTS UNDER ANTITRUST LAWS

WASHINGTON, D.C. -- The Department of Justice announced today a change in antitrust enforcement policy that would permit the Department to challenge foreign business conduct that harms American exports when the conduct would have violated U.S. antitrust laws if it occurred in the United States.

"Applying the antitrust laws to remove illegal barriers to export competition makes sense as a matter of law and policy," said Attorney General William P. Barr. "Our antitrust laws are designed to preserve and foster competition, and in today's global economy competition is international."

The new policy, effective immediately, does not alter the jurisdiction of U.S. courts over foreign persons or corporations, Barr said. Ordinary jurisdictional principles will continue to apply.

Under the changed policy, the Department will challenge anticompetitive conduct such as boycotts and other exclusionary activities that hinder the export of American goods or services to foreign markets, the Attorney General said. For example, the Department would take action against a foreign cartel aimed at limiting purchases from U.S. exporters or depressing the prices

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they receive, or a boycott of American goods or services organized by competitors in foreign markets.

Today's announcement resulted from a Department review of antitrust enforcement policy on export restraints.

It supersedes a footnote in the Department's 1988 Antitrust Enforcement Guidelines for International Operations that had been interpreted as prohibiting challenges to anticompetitive conduct in foreign markets unless there was direct harm to U.S. consumers.

Applying the antitrust laws to anticompetitive conduct that harms U.S. exports is consistent with the enforcement policy the Department had followed for many years prior to 1988, said James F. Rill, Assistant Attorney General in charge of the Antitrust Division.

"Our review of this issue confirms that Congress did not intend the antitrust laws to be limited to cases based on direct harm to consumers," said Rill. "As recently as 1982, Congress clarified the jurisdictional reach of the Sherman Act to cover cases of direct, substantial and reasonably foreseeable harm to U.S. export commerce.

"We have always applied our law to challenge foreign as well as domestic cartels aimed at raising prices to American consumers, and during most of this period we were prepared in appropriate cases to attack cartels aimed at our exporters, as

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well. Today, when both imports and exports are of growing importance to our economy, we should not limit our concern to competition in only half of our trade."

Rill said the Department would continue its practice of notifying and consulting with foreign governments in antitrust proceedings that significantly affect their interests.

"Our concern is opening markets to competition," said Rill. "In most cases conduct that harms our exporters also harms foreign consumers, and may be actionable under the other country's antitrust laws. If the importing country is better situated to remedy the conduct, and is prepared to act, we are prepared to work with them."

Rill emphasized that the policy change has general application and is not aimed at particular foreign markets.

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Department of Justice Policy Regarding Anticompetitive Conduct that Restricts U.S. Exports

Statement of Antitrust Enforcement Policy

The Department of Justice will, in appropriate cases, take antitrust enforcement action against conduct occurring overseas that restrains United States exports, whether or not there is direct harm to U.S. consumers, where it is clear that:

(1) the conduct has a direct, substantial, and reasonably foreseeable effect on exports of goods or services from the United States;

(2) the conduct involves anticompetitive activities which violate the U.S. antitrust laws -- in most cases, group boycotts, collusive pricing, and other exclusionary activities; and

(3) U.S. courts have jurisdiction over foreign persons or corporations engaged in such conduct.

This policy statement in no way affects existing laws or established principles of personal jurisdiction.

This enforcement policy is one of general application and is not aimed at any particular foreign country. The Department of Justice will continue its longstanding policy of considering principles of international comity when making antitrust enforcement decisions that may significantly affect another government's legitimate interests. The Department also will continue its practice of notifying and consulting with foreign governments, where appropriate.

This statement of enforcement policy supersedes a footnote in the Department of Justice's 1988 Antitrust Enforcement Guidelines for International Operations that generally had been interpreted as foreclosing Department of Justice enforcement actions against anticompetitive conduct in foreign markets unless the conduct resulted in direct harm to U.S. consumers. The new policy represents a return to the Department's pre-1988 position on such matters.

If the conduct is also unlawful under the importing country's antitrust laws, the Department of Justice is prepared to work with that country if that country is better situated to remedy the conduct and is prepared to take action against such conduct pursuant to its antitrust laws.

Department of Justice Antitrust Enforcement Policy Regarding Anticompetitive Conduct that Restricts U.S. Exports

Background

The Change Announced Today Would Return the Department to its Longstanding Pre-1988 Enforcement Policy

The Justice Department's longstanding enforcement policy prior to 1988 was most clearly expressed in the Department's 1977 Antitrust Guide for International Operations, which identified two purposes served by the Antitrust laws' application to international trade: to protect U.S. consumers from restraints that raised the price or limited their choice of imported as well as domestic products and, separately,

> to protect American export and investment opportunities against privately imposed restrictions. The concern is that each U.S.-based firm engaged in the export of goods, services or capital should be allowed to compete on the merits and not be shut out by some restriction imposed by a bigger or less principled competitor.

Although the Department had brought few cases based solely on harm to exporters in recent years, it did not hesitate to bring such cases when there was evidence of a violation. For example, in 1982 the Department sued eight Japanese trading companies for fixing the prices they paid Alaskan seafood processors for crab to be exported to Japan. The case was settled by a consent decree. *U.S. v. C. Itoh & Co., et al.*, 1982-83 (CCH) Trade Cases ¶65,010 (W.D. Wash. 1982).

The Department's 1988 Antitrust Enforcement Guidelines for International Operations, however, indicated that harm to exporters would not be a sufficient basis for enforcement action unless there also was direct harm to U.S. consumers. While acknowledging that Congress had provided for actions against export restraints in 1982 when it codified Sherman Act subject matter jurisdiction in foreign commerce cases, the Guidelines stated that as a matter of enforcement policy,

> The Department is concerned only with adverse effects on competition that would harm U.S. consumers by reducing output or raising prices.

The Department has never limited its antitrust enforcement to cases in which there is direct harm to consumers where the conduct in question is wholly domestic. The antitrust laws have always applied to anticompetitive conduct that harms producers as well as to conduct that harms consumers. For example, a buyers' cartel that suppresses the price paid to suppliers is treated in the same way as a sellers' cartel that raises the price charged to customers -- even though the immediate harm is to producers in the first instance and to consumers in the second. The 1988 policy, however, has been interpreted as precluding action against a cartel of offshore buyers who suppress prices paid to U.S. exporters, even though it has always been clear that the Department would act against offshore sellers' cartels that collusively raise prices to U.S. consumers.

The Policy Implements Existing Law

The enforcement policy announced today is fully consistent with existing law. The Supreme Court has confirmed that anticompetitive conduct that restrains American exports is actionable under the antitrust laws, and there is no debate about the law on this issue. Its clearest expression by the Supreme Court was in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969), in which the Court sustained Zenith's antitrust challenge to activities of a Canadian patent pool whose members conspired to give licenses only to firms manufacturing in Canada, and to refuse licenses Zenith needed to export U.S.-made radios and televisions to Canada.

Congress, moreover, endorsed the antitrust laws' application to conduct that restrains exports in the 1982 Foreign Trade Antitrust Improvements Act. 15 U.S.C. §6a. The Act amended the Sherman Act, and added a parallel provision to the Federal Trade Commission Act, codifying their jurisdictional reach over foreign conduct that has a direct, substantial and reasonably foreseeable effect "on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States." The Act was intended as a clarification of existing law, and was not seen as an extension of antitrust jurisdiction.

The Department Will Seek Cooperation With Foreign Antitrust Authorities

In adopting this enforcement policy, the Justice Department recognizes that a number of unique considerations can affect antitrust enforcement that involves parties or conduct outside the United States. The policy will operate within existing law, and will not alter the jurisdictional principles that determine when foreign firms and individuals are within the reach of U.S. courts.

The Department will also continue its longstanding policy of considering international comity principles when making antitrust enforcement decisions that may significantly affect another government's legitimate interests. Under this approach, the Department will continue its present practice with respect to notification and consultation with foreign governments. In most cases, conduct that harms U.S. exporters also harms foreign consumers who benefit from the availability of imported goods and services. Such conduct may be actionable under the importing country' antitrust laws. The Department of Justice is prepared to work with antitrust authorities in the importing country if they are better situated to remedy the conduct and are prepared to act.